SANTHI VATHIAN & ANOR v. L/KPL NADZIR AFIQ ABDUL MALIK & ORS

HIGH COURT MALAYA, SHAH ALAM
CHOO KAH SING J
[CIVIL SUIT NO: BA-21NCVC-51-04-2021]
12 MAY 2022

Abstract – *An inquest proceeding is not a trial. A coroner's verdict, which is determined by established facts, does not amount to any conviction. A coroner's findings could only be used as a basis to launch a criminal or civil suit but the finding of facts in a coroner's report could not be treated as facts that have already been proven without calling any witnesses to prove those facts.*

TORT: *Negligence – Death in custody – Deceased arrested and detained pursuant to Security Offences (Special Measures) Act 2012 – Deceased and two other detainees complained of not feeling well – Other detainees sent to hospital first before deceased – Deceased died of fatal arrythmias – Death caused by combination of underlying problem of myocardial bridging, coronary atherosclerosis and leptospiral – Whether police owed duty of care to deceased while under custody – Whether there was breach of duty of care – Whether breach caused and/or contributed to deceased's death*

TORT: *Misfeasance – Misfeasance in public office – Death in custody – Deceased arrested and detained pursuant to Security Offences (Special Measures) Act 2012 – Deceased and two other detainees complained of not feeling well – Other detainees sent to hospital first before deceased – Deceased died of fatal arrythmias – Death caused by combination of underlying problem of myocardial bridging, coronary atherosclerosis and leptospiral – Whether police committed any illegal wrongdoing – Whether there was malice – Whether police acted with improper or ulterior motive – Whether deceased's death in custody could immediately give rise to claim of public misfeasance*

The plaintiffs were the administrators of the estate of one Thanabalan Subramaniam ('deceased'), who was arrested and detained pursuant to the Security Offences (Special Measures) Act 2012 ('SOSMA'). The first to 11th defendants were police officers; the 12th defendant was the Inspector General of Police at the material time; and the 13th defendant was the Government of Malaysia. During detention, the deceased and two other detainees complained that they were not feeling well. Acting upon the instruction of the eighth defendant, the seventh defendant attended to the complaint. Having found that the other two detainees looked weak while the deceased's condition was still good, the other two detainees were sent to the hospital. The eight defendants later received information that the deceased

had fainted in the lock-up cell. The deceased was rushed to the hospital but had unfortunately passed away. A post mortem carried out revealed that the deceased died of 'fatal arrythmias' *ie*, the heart stops beating and the cause of this was the combination of the underlying problem of myocardial bridging, coronary atherosclerosis and the presence of leptospiral infection, a bacterial disease that was a 'stressor', found in the deceased's body. An inquest was carried out and the coroner found that (i) the lock-up cell where the deceased was detained was filthy and could have attracted rats; (ii) the rats could have contaminated the water in the urine bowl, which the deceased could have drunk from, causing him to contract leptospirosis which then led to his death ('coroner's findings'). The first plaintiff, the wife of the deceased, commenced a dependency claim, pursuant to s. 7 of the Civil Law Act 1956 ('CLA'), while the second plaintiff, the deceased's father-in-law, claimed pursuant to s. 8 of the CLA. The plaintiffs' action was premised upon the cause of actions of tort of negligence, misfeasance in public office and vicarious liability on the part of the 13th defendant for the actions/inactions of the first to 12th defendant. In support of the claim, the plaintiffs urged the court to take judicial notice of the coroner's findings.

Held (dismissing claim):

(1) The coroner's erroneous findings were based on speculations and not evidence. The plaintiffs' entire narrative was not supported by any cogent or independent evidence that the deceased contracted leptospiral infection in the lock-up cell, other than relying on the coroner's erroneous finding. (paras 27, 28 & 34)

(2) The deceased's leptospiral infection was in the second phase. The deceased was arrested on 29 March 2018 and complained about feeling unwell on 17 April 2018; it was on the 20th day of his arrest that the deceased complained that he was sick. There was a probability that the deceased could have been infected by the disease, before his arrest. The probability had not been ruled out by any probative evidence in the plaintiffs' case. The plaintiffs had not proved, on a balance or probabilities, that the defendants were to blame for the deceased having contracted leptospiral infection while in the defendants' custody. (paras 31, 32 & 37)

(3) The detainees complained at the same time they were not feeling well. Only designated police officers and a that certain number of police officers were allowed to escort SOSMA detainees to the hospital. The seventh defendant assessed the situation and believed that the other two detainees were in a more serious condition that the deceased. According to the seventh defendant, the deceased told him that he could wait for his turn to be sent to the hospital later. Perhaps for that reason, it confirmed the seventh defendant's observation that the other two

detainees were in a more serious condition and they needed to be sent to the hospital first. Given the peculiarity of the facts of this case, neither the seventh nor eighth defendants could be faulted for making a decision to send the deceased to the hospital only after the seventh defendant had sent the other two detainees to the hospital. (paras 40 & 41)

(4) A medical expert's opinion was crucial for the court to make a finding in relation to the chances for the deceased's life to be saved. The deceased was not alive when brought to the hospital. If the deceased was sent first to the hospital, would the doctor in the hospital have been able to diagnose the deceased was suffering from leptospiral infection, in addition to diagnosing the underlying problems of the deceased? There was no medical opinion offered to the court to make an informed assessment of the probability of the likelihood that the deceased could have survived if he was sent to the hospital earlier, before the other two detainees. (paras 47 & 49)

(5) Even though the defendants did owe a duty of care to the deceased, the defendants did not breach their duty. The causal link between any breach and the deceased's death was not established in that his death was caused by the defendants' actions or inactions or the breach of the statutory requirements. The defendants were not liable to pay damages for the plaintiffs' dependency and estate claims under the cause of action of tort of negligence. (paras 57 & 58)

(6) There was not a shred of evidence in the plaintiffs' case to support a claim of misfeasance in public office in that the defendants had committed any illegal wrongdoing. No evidence of malice was presented before the court. There was no evidence to suggest that the defendants acted with an improper or ulterior motive or that they had no power to do the act complained of and that such act injured the plaintiffs. The plaintiffs did not show any evidence that the defendants had concealed, distorted or destroyed any evidence. The mere fact that the deceased died in the custody of the defendants could not immediately give rise to a claim of public misfeasance. The plaintiffs' claim under this head was totally unsustainable. (para 60)

Case(s) referred to:

Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal [2014] 9 CLJ 15 CA ***(refd)***

Janagi Nadarajah & Anor v. Sjn Razali Budin & Ors [2021] 10 CLJ 915 HC ***(refd)***

Selvi Narayan & Anor (Administrators Of Estate Of Chandran Perumal; Deceased) v. Koperal Zainal Mohd Ali & Ors [2017] 5 CLJ 84 HC ***(refd)***

Suzana Md Aris v. DSP Ishak Hussain & Ors [2010] 6 CLJ 712 HC ***(refd)***

Teoh Meng Kee v. PP [2014] 7 CLJ 1034 CA ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 7, 8
Federal Constitution, art. 5(1)

For the plaintiffs - Visvanathan & V Sanjay Nathan; M/s Saibullah MV Nathan & Co
For the defendants - Mohd Ashraf Abd Hamid & Syhriah Shapiee; SFCs

Reported by Najib Tamby

JUDGMENT

Choo Kah Sing J:

Introduction

[1] The first plaintiff is the wife of the deceased Thanabalan a/l Subramaniam (hereafter "the deceased"). The first plaintiff's claim is a dependency claim pursuant to s. 7 of the Civil Law Act, 1956. Whereas, the second plaintiff's claim, the father-in-law of the deceased, is an estate claim pursuant to s. 8 of the Civil Law Act, 1956. Both plaintiffs are the administrators of the estate of the deceased.

[2] The plaintiffs' action is mounted on the fact that the deceased died under the custody of The Royal Malaysia Police in the Detention Centre of Shah Alam Police Headquarters (IPD, Shah Alam) (hereafter "the detention centre"). As such, the plaintiffs' action is premised on the cause of actions of tort of negligence, misfeasance in public office and vicarious liability on the part of the 13th defendant for the actions/inactions of the first to 12th defendants.

[3] The first to 11th defendants are police officers who are implicated to be responsible for the death of the deceased. The 12th defendant was the Inspector General of Police at that material time, and the 13th defendant is the Government of Malaysia.

The Salient Facts

[4] The deceased was arrested on 29 March 2018. His arrest was under the Security Offences (Special Measures) Act 2012 ("SOSMA"). The deceased was supposed to be detained for 28 days under the SOSMA which was between 30 March 2018 and 26 April 2018. The deceased was placed at the detention centre in Shah Alam, Selangor, while under detention.

[5] During the detention, on 17 April 2018, around 6pm, the deceased and two other detainees, namely Logeswaran and Edward John, complained that they were not feeling well. The complaint was brought to the attention of the investigating officer ASP Mohammad Hashim bin Kasman (the eighth defendant (D8)/the fifth witness in the defendants' case (DW5)) (hereafter "D8").

[6] D8 then instructed two of his officers to attend to the complaint, namely SJN Roslan bin Ahmad (the seventh defendant (D7)/the fourth witness in the defendants' case (DW4)) (hereafter "D7") and one constable Shahrul. D7 informed D8 that the conditions of Logeswaran and Edward John were more serious than the deceased as they looked weak. D7 also told D8 that the deceased "masih dalam keadaan baik". D8 then instructed D7 and Constable Shahrul to first send Logeswaran and Edward John to the hospital.

[7] According to D8, there are special procedures to follow for SOSMA detainees to be sent to hospital. D7 and Constable Shahrul could not send all three SOSMA detainees at the same time for security reason. D8 then instructed another officer, Corporal Zeyrul, to attend to the deceased. While Corporal Zeyrul was on his way to the detention centre, D8 received information that the deceased had fainted in the lock-up cell. D8 then instructed Corporal Zeyrul to immediately send the deceased to hospital once he arrived. Around 9pm, D8 was told that the deceased had passed away.

The Findings Of This Court

[8] Essentially, the issues before this court are (i) whether the defendants owed a duty of care to the deceased while under the custody of The Royal Malaysia Police in the detention centre; (ii) if the defendants owed a duty of care to the deceased, did the defendants breach the duty(ies); (iii) whether the breach (if any) had caused and/or contributed to the death of the deceased; and finally (iv) whether the defendants are liable to pay damages if (i), (ii) and (iii) are found to be affirmative.

Duty Of Care

[9] The plaintiffs' counsel has submitted at length that a duty of care was owed to the deceased by the defendants. This court has no hesitation to accept the plaintiffs' counsel's submission on this proposition of law. Our jurisprudence on this proposition of law has been well endorsed in several high-profile cases of similar nature involving the death of detainees in the custody of the police. Therefore, this court does not intend to regurgitate the law here (see *Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal* [2014] 9 CLJ 15; [2015] 1 MLJ 353, CA; *Suzana Md Aris v. DSP Ishak Hussain & Ors* [2010] 6 CLJ 712, HC; *Selvi Narayan & Anor (Administrators Of Estate Of Chandran Perumal; Deceased) v. Koperal Zainal Mohd Ali & Ors* [2017] 5 CLJ 84, HC; *Janagi Nadarajah & Anor v. Sjn Razali Budin & Ors* [2021] 10 CLJ 915; [2021] MLRHU 1557, HC).

Did The Defendant Breach That Duty?

[10] The next question is, which is a crucial one, whether the defendants breached that duty of care? Article 5(1) of the Federal Constitution of Malaysia states: "No person shall be deprived of his life or personal liberty save in accordance with law." In the present case, the deceased's life and liberty was compromised because of the exercise of power by the police under the law to detain him. Hence, it is justified to say that an assumed responsibility has been imposed on the police to ensure that the deceased's well-being, including his health and safety, was not impaired while under the defendants' custody.

[11] The assumed responsibility imposed on the defendants shall include providing a decent clean environment to all the detainees under their custody. This includes providing a lock-up cell free from infectious disease like leptospirosis, a bacterial disease that is said to be a "stressor" which caused the death of the deceased, other than his underlying problems. It is the plaintiffs' narrative that the deceased contracted the leptospiral infection while in the custody of the defendants. Hence, the defendants have breached their duty, the plaintiffs' counsel submitted.

[12] It is also a duty in law for the defendants to provide medical needs for detainees who are in their custody. It is the plaintiffs' narrative that the defendants failed to immediately attend to the deceased's need for medical attention or treatment which had led to the death of the deceased. Therefore, the defendants have breached their duty, the plaintiff's counsel submitted.

The Evidence For The Breach

[13] The plaintiffs called four witnesses, namely the first and second plaintiffs ("PW3" and "PW2" respectively), one Jothiletchumy a/p Ramiah ("PW4"), the former employer of the deceased, and one Dr Nur Ayutimasery Binti Abdullah ("PW1"). Essentially, the evidence of PW2, PW3 and PW4 centres on establishing the damages claim. The liability for the plaintiffs' case is focused on the evidence of PW1. PW1 is a medical forensic expert who conducted the autopsy examination on the deceased and prepared the post mortem report of the deceased (see pp. 115 to 120 of ikatan dokumen bersama (terpinda)) (hereafter "the post mortem report").

The Evidence Of PW1

[14] An autopsy examination was carried out on the deceased at the Hospital Tengku Ampuan Rahimah, Klang on 18 April 2018 at 2pm. The post mortem report concludes as follows:

> 1. The body was positively identified by the deceased's younger brother as the above named-person.

2. Postmortem examination showed no significant marks of injury that could have caused or contributed to his death at that moment in time.

3. Postmortem examination showed the presence of myocardial bridging involving the left anterior descending coronary artery. Myocardial bridging is a common coronary artery anomaly. It has the potential to cause significant myocardial insufficiency that may lead to fatal arrythmias and sudden cardiac death (1.2). Histological examination of the deceased's heart showed evidence of interstitial fibrosis. This is suggestive of remote ischaemia (heart muscle damage due to reduced blood and oxygen supply) that would have been a sequela to his underlying myocardial bridging.

4. There was also the presence of coronary atherosclerosis involving the left anterior descending artery. Although the degree of luminal occlusion alone would not have rendered the atheroma as a potential cause for significant myocardial insufficiency, the cumulative effect of both myocardial bridging and coronary atherosclerosis in the same coronary artery would very likely have the potential to significantly impair the myocardial perfusion.

5. Molecular analysis (PCR) of postmortem tissue samples showed the presence of leptospiral DNA in his kidney and lung tissues, a categorical evidence of leptospiral infection. The coexisting leptospiral infection would have been a significant stressor to his underlying cardiac conditions aggravating the myocardial insufficiency.

6. In view of the circumstances of his death, postmortem examination findings, absence of injury, negative postmortem toxicology and the presence of leptospiral infection, it is reasonable to conclude that his death at the moment in time was caused by his underlying cardiac conditions aggravated by leptospiral infection in causing myocardial insufficiency and subsequent fatal arrythmias.

CAUSE OF DEATH

Myocardial bridging with coronary atherosclerosis in a man with leptospiral infection.

(emphasis added)

[15] PW1 explains in her post mortem report that the deceased died of "fatal arrythmias", *ie*, the heart stops beating. The cause of it is, according to PW1's finding, the combination of the underlying problem of myocardial bridging, coronary atherosclerosis and the presence of leptospiral infection as the stressor found in the deceased's body.

[16] PW1 states in her report that "it (myocardial bridging) has the potential to cause significant myocardial insufficiency that may lead to fatal arrythmias". Myocardial bridging is congenital (inborn) problem, but PW1 opined that this factor by itself, in the deceased's case, could not have caused his death.

[17] PW1 explains that the presence of coronary atherosclerosis by itself also cannot cause the deceased's death. The presence of coronary atherosclerosis could be caused by the deceased's diet and lifestyle, lack of exercise and aging factor, PW1 explained.

[18] In her post mortem report, PW1 states "the cumulative effect of both myocardial bridging and coronary atherosclerosis in the same coronary artery would very likely have the potential to significantly impair the myocardial perfusion". The presence of both myocardial bridging and coronary atherosclerosis are not the cause of the deceased's death.

[19] In her final finding, PW1 states "it is reasonable to conclude that his death at the moment in time was caused by his underlying cardiac conditions aggravated by leptospiral infection in causing myocardial insufficiency and subsequent fatal arrythmias".

[20] Leptospiral infection is caused by leptospirosis which is a bacterial disease. The bacteria are commonly found and spread through the urine of animals, particularly rodents. One of the ways in which the bacteria can pass on to humans is when humans consume water or food which is contaminated by such bacteria. As stated earlier, it is the plaintiffs' case that the deceased contracted and suffered leptospiral infection while in the custody of the defendants.

Where And When Did The Deceased Contract The Leptospiral Infection?

[21] The evidence that the plaintiffs have relied on to establish the fact that the deceased contracted leptospiral infection while in the custody of the defendants is the finding of facts by the coroner judge Puan Rofiah Binti Mohamad in the inquest proceeding.

[22] The coroner judge's finding of facts can be found in her 'nota prosiding' dated 21 December 2020 (endorsed on 30 December 2020) (see pp. 298 to 300 of ikatan dokumen bersama (terpinda)). The coroner judge makes the following finding of facts:

> ... Daripada keterangan yang ada saya berpuas hati dan mendapati atas imbangan kebarangkalian bahawa keadaan dan hal ehwal lokap di mana si mati ditempatkan adalah kotor dan tidak diselenggara dengan baik dari segi kebersihan ... Secara lazimnya keadaan ini sudah tentu menjemput kehadiran tikus-tikus yang membawa bakteria leptospirosis. Ini diburukkan lagi dengan ketiadaan bekalan air bersih di dalam lokap yang boleh digunakan oleh tahanan sebagai air minuman yang selamat ... Oleh yang demikian, keterangan-keterangan yang mengatakan tahanan-tahanan terpaksa menggunakan air yang mengalir dari mangkuk tandas untuk memenuhi keperluan asas kepada air minuman adalah mempunyai asas, berjustifikasi dan tidak menghairankan. Justeru, kebarangkalian adalah tinggi bahawa si mati telah dijangkiti dengan bakteria di dalam kencing tikus ini akibat beliau terpaksa menggunakan air dari mangkuk tandas

> sebagai minuman. Walau jika pun tidak dibuktikan si mati ini telah meminum air dari mangkuk tandas ini pun, keadaan lokap yang kotor dengan kehadiran tikus-tikus adalah satu keadaan yang boleh menjadi punca jangkitan kencing tikus yang dialami oleh si mati ... turut menyumbang kepada kegagalan untuk memastikan si mati dibawa ke hospital dengan kadar segera dan munasabah bagi memastikan si mati mendapat rawatan yang sepatut, yang mana ia mungkin dapat menyelamatkan nyawanya ...

[23] In *Teoh Meng Kee v. PP* [2014] 7 CLJ 1034; [2014] MLJU 846, para. [48], the Court of Appeal states that there is no indictment, no prosecution, no defence and no trial in an inquest proceeding. It is simply an attempt to establish facts. "The coroner's verdict is not determined by probabilities but by established facts. A coroner is bound by evidence and can only find facts proved by evidence, not guesswork", says the Court of Appeal.

[24] The Court of Appeal also states that "a coroner's inquest is merely a 'court of law', not a 'court of justice'. Its verdict does not amount to any conviction." The Court of Appeal cited the *Practice Directions No. 1 of 2007: Guidelines on inquest*, particularly on the part of Verdict, wherein it states. "No verdict shall be framed in such a way to appear to determine any question of (a) criminal liability on the part of a named person; or (b) Civil liability."

[25] Applying the legal principles from the Court of Appeal's decision, this court finds the finding of facts in the inquest proceeding by the coroner judge cannot be treated as facts that have been proved in the plaintiffs' case.

[26] One of the objectives in an inquest is to establish a fact. The coroner judge made a finding of fact that the lock-up cell where the deceased was detained was filthy. She then went on to make a finding of fact based on her own conjecture that the lock-up cell could have attracted rats. The coroner judge went on her own conjecture to say that rats could have contaminated the water in the urine bowl. The coroner judge then made a further finding of fact that the deceased drank the contaminated water (which is not established as a fact) from the toilet bowl. As a result, the deceased contracted the leptospiral infection which brought to the death of the deceased, the coroner judge concluded.

[27] This court is not ready to accept the plaintiffs' counsel's submission to take judicial notice of the coroner judge's findings as being proved in the plaintiffs' case. First, the coroner judge has erred in her finding that the water in the toilet bowl was contaminated by bacteria that carried the disease of leptospirosis. That finding of fact was based on her own speculation; the finding was not based on evidence. There was no evidence presented before the coroner judge that the water in the toilet bowl was contaminated by bacteria that carried the disease of leptospirosis.

[28] Secondly, the coroner judge has erred in her finding that the deceased had consumed the water from the toilet bowl. That finding of fact was again based on her own inference. During the inquest proceeding, two detainees, namely K Biranava Birabu (SI5) and Kogilan (SI14) gave their testimonies stating that there was no clean water for the detainees to consume in the lock-up cell, that fact alone cannot be taken as evidence to make a finding of fact that the deceased consumed the water from the toilet bowl.

[29] Lastly, the coroner judge states that "walau jika pun tidak dibuktikan si mati ini telah meminum air dari mangkuk tandas ini pun, keadaan lokap yang kotor dengan kehadiran tikus-tikus adalah satu keadaan yang boleh menjadi punca jangkitan kencing tikus yang dialami oleh si mati." The coroner judge made a finding of fact that because of the filthy conditions in the lock-up cell, it had attracted the presence of rats in the lock-up cell, and the rats' urine had caused the deceased to contract the disease. This finding of fact is purely speculation. It is wrong in law for a coroner judge in an inquest proceeding to make finding of fact based on speculation. There was not an iota of evidence presented before the coroner judge that the lock-up cell was infested with rats bearing the bacteria that would cause leptospirosis disease.

[30] This court is perturbed with the above erroneous findings of facts by the coroner judge. This court reiterates the decision of the Court of Appeal in *Teoh Meng Kee* which states that "the coroner's verdict is not determined by probabilities but by established facts. A coroner is bound by evidence and can only find facts proved by evidence, not guesswork."

[31] PW1 explains that the deceased's leptospiral infection was in the second phrase (as it had infected the deceased's lung and especially the kidney). PW1 further explains that the deceased could have been infected by the bacteria for around ten to 30 days.

[32] The deceased was arrested on 29 March 2018. The deceased complained feeling unwell on 17 April 2018. It is on the 20th day of his arrest that the deceased complained sick. In other words, there is a probability that the deceased could have been infected by the disease before his arrest on 29 March 2018. This probability has not been ruled out by any probative evidence in the plaintiffs' case. During cross-examination, PW1 told the court that she could not confirm the source from which that the deceased had contracted the leptospiral infection.

[33] This court observes that it was stated in the medical report of another detainee Edward John who received medical treatment on 17 April 2018 that he was diagnosed with "upper respiratory tract infection". In the medical report of detainee Logeswaran who also received treatment on 17 April 2018, it was stated that he was diagnosed with "acute gastroenteritis". Both Edward John and Logeswaran were attended to by the same doctor Mohamad Falah bin Abu Bakar. Both detainees had fever, which is a

symptom commonly found in a patient who contracts leptospiral infection. The plaintiffs' counsel did not call the doctor to give evidence in this court proceeding as to whether the sickness of the two detainees could have any relation to leptospiral infection.

[34] The entire plaintiffs' narrative is not supported by any cogent or independent evidence that the deceased contracted leptospiral infection in the lock-up cell, other than relying on the coroner judge's erroneous finding of facts. The plaintiffs' counsel urges this court to take judicial notice of the coroner judge's report as if those facts have already been established and proved in the plaintiffs' action. This court is of the considered view that the approach adopted by the plaintiffs' counsel is misconceived in law.

[35] It is trite that he who asserts a fact must bear the burden of proof. Therefore, the plaintiffs are required to prove those facts alleged on a standard of balance of probabilities. A coroner judge's findings can be used only as a basis to launch a criminal or civil suit. The finding of facts in a coroner's report cannot be treated as facts that have already been proven without calling any witness to prove those facts. An inquest proceeding is not a trial. The plaintiffs' counsel ought to have considered calling (or by subpoena) persons who were detained at the same time as the deceased such as Logeswaran, Edward John, K Biranava Birabu or Kogilan, or any other detainee to give evidence to support the plaintiffs' narrative.

[36] This court, after having combed through the evidence, finds there is no probative evidence to make the following finding of facts: (i) the time the deceased contracted the leptospiral infection; as the deceased could have had contracted the disease before or after his arrest; (ii) that the lock-up cell or the water in the toilet bowl was contaminated with infectious diseases like leptospirosis; (iii) that the deceased consumed the water from the toilet bowl which was contaminated with bacteria that had caused the deceased to suffer from leptospiral infection.

[37] As such, this court is not satisfied that the plaintiffs have proved, on a balance of probabilities, that the defendants are to blame for the deceased having contracted leptospiral infection while in the defendants' custody.

Whether The Deceased's Life Could Have Been Saved If Not For The Delay?

[38] Notwithstanding the above and regardless of where and when the deceased contracted the leptospiral infection, it is still a fact that the deceased was suffering leptospiral infection while at the detention centre. It is the plaintiffs' case that the defendants failed to immediately attend to the deceased's need for medical attention, as a result, the deceased died. It is then incumbent upon this court to ask whether the deceased's life could have been

saved if not for the decision taken to send the deceased to hospital only after Logeswaran and Edward John had been sent to hospital. In other words, would it have made a difference if the deceased was sent to the hospital before Logeswaran or Edward John?

[39] It is an admitted fact that there was lack of manpower to handle SOSMA detainees on that day. Could the lack of manpower be the cause of the death of the deceased? There is no evidence to suggest that the way the police dealt with the three detainees complaining ill at the same time due to lack of manpower was a common problem that the police have repeatedly failed to address. The Royal Malaysia Police force can be shorthanded at times, but that deficit cannot be used by itself as leverage to assert an immediate breach of duty on the part of the police when the police are unable to immediately attend to something when called upon to do so. The mere delay in taking action cannot be construed as an immediate breach of a duty. Whether delayed action can be tantamount to a breach of duty has to be considered on a case-to-case basis, and it depends on the peculiarity of the facts before the court.

[40] In the present case, three SOSMA detainees complained at the same time that they were not feeling well. As such, the situation indeed places the investigating officer D8 in a tight situation. For SOSMA detainees, only designated police officers and certain number of police officers are allowed to escort SOSMA detainees to the hospital. D8 instructed D7 and Constable Shahrul to attend to the situation. D8 told the court that at first there were only two detainees who complained they were not feeling well. When the police officers arrived, they were told there were three detainees complaining of not feeling well. In that given situation, only two detainees could be escorted to the hospital as there were only two officers who were deployed to attend to the situation.

[41] D7 (or DW4) told the court that he assessed the situation and believed that Logeswaran and Edward John were in more serious condition than the deceased. According to D7, he said the deceased told him that he could wait for his turn to be sent to the hospital later. Given the situation, D7 had to make a decision. D7 related the situation to D8 and obtained approval from D8 to first send Logeswaran and Edward John to the hospital. Although D7 has no medical training background, given the situation, he was not spared from making an immediate decision, *ie*, who should be sent to the hospital first. D7 told the court that the deceased told him that he could wait for his turn. Perhaps for that reason, it confirmed D7's observation that Logeswaran and Edward John were more serious, and they needed to be sent to the hospital first. This court is of the considered view that given the peculiarity of the facts in this case, neither D7 nor D8 could be faulted for making a decision to send the deceased to the hospital only after D7 had sent Logeswaran and Edward John to hospital.

Would It Have Made A Difference?

[42] The next critical question is: In the event the deceased was sent to the hospital first, would the deceased still be alive today? The doctor who attended the deceased was Avinash a/l Chandrasekharan Pillay. He was not called to give evidence. Based on his police report SEK 9/004445/18 dated 17 April 2018 (see p. 23, ikatan dokumen bersama (terpinda)), the deceased was no longer alive when he arrived at the hospital. He attempted to resuscitate the deceased, but to no avail. He pronounced the death of the deceased at 9.05pm on 17 April 2018. The cause of death is stated as "punca kematian tidak ketahui". The plaintiffs' counsel could have called Dr Avinash a/l Chandrasekharan Pillay as a witness to shed some light on the condition and appearance of the deceased's body when the deceased was brought into the hospital. There is no medical opinion from Dr Avinash a/l Chandrasekharan Pillay to say the deceased's life could have been saved if he was admitted earlier to the hospital.

[43] Based on the medical opinion of PW1, she told the court that patient who suffers from leptospiral infection can be treated. However, there is no affirmative medical expert opinion from PW1 to suggest that in the deceased's case his life could have been saved if he was admitted earlier to the hospital.

[44] This court disagrees with the plaintiff's counsel's submission that PW1 has given a positive answer to the question asked whether the deceased's life could have been saved. PW1's answer is recorded as follows:

> Q: So Dr, ya, seorang yang mempunyai jangkitan leptospira, ya, adakah ianya satu keadaan yang mana boleh diselamatkan sekiranya diberikan rawatan yang sewajarnya di hospital ataupun medical treatment lah, ya, bagi keadaan ini?
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> A: Boleh, Yang Arif. Seperti yang saya katakan tadi, leptospira ini dia mempunyai spektrum daripada yang paling mild sehingga yang paling teruk. Maksud saya di sini, seseorang itu akan menunjukkan tanda-tanda sakit. Mungkin penyakit itu akan overlap dengan penyakit lain, tetapi jika beliau dibawa ke hospital, saya pasti doktor yang merawat akan melakukan ujian dan salah satunya mereka mungkin akan mencari sebab fever. Selalunya, seseorang itu akan mempunyai fever lah, yang paling mild adalah fever. Jadi, doktor akan mencari punca fever tersebut. Selalunya denggi dan leptospira adalah salah satu ujian yang kita di hospital akan selalu ambil untuk menentukan sebab fever tersebut, demam tersebut, Yang Arif.

[45] PW1 gave a general answer as to how a doctor would attend to a patient when admitted to hospital. Medical tests would be carried out to determine the cause of illness. As PW1 said, there is a spectrum of severity of a leptospiral infection which ranges from mild to very serious. PW1 did

not explicitly give her opinion to this court that based on the deceased's condition before he died, if he had reached the hospital earlier, the deceased's leptospiral infection could have been diagnosed on time to save his life.

[46] It is in evidence that PW1 said the deceased was suffering from second phase of the infection which was considered as serious because the bacteria already infected the deceased's kidney. The plaintiffs' counsel did not elicit from PW1 as to how much time a doctor would need to examine a patient to diagnose that the patient was suffering from leptospiral infection so that proper medication could be administered. This is a material medical opinion, because if the time to diagnose a patient suffering from leptospiral infection will take several hours or more, then it would not have made a difference whether the deceased was sent earlier to the hospital.

[47] The time the deceased reached the hospital was 8.35pm. on 17 April 2018 (according to the police report of Dr Avinash a/l Chandrasekharan Pillay dated 17 April 2018). The deceased was not alive when brought to the hospital. That means the deceased could have died between the hours after 7.45pm (when D7 reached the detention centre and took Logeswaran and Edward John to the hospital) and before 8.35pm. There was approximately less than an hour in between the time the deceased was last seen still alive and the time the deceased reached the hospital. If the deceased was sent first to the hospital, in that short span of less than an hour, would the doctor in the hospital have been able to diagnose the deceased was suffering from leptospiral infection, in addition to diagnosing the underlying problems of the deceased. There is no medical opinion offered to this court to make an informed assessment of the probability of the likelihood that the deceased could have survived if he was sent the hospital earlier, *ie*, before instead of after Logeswaran and Edward John were sent to hospital.

[48] Further, one important fact is that it is not established in evidence that the police knew of the underlying conditions (myocardial bridging and coronary atherosclerosis) of the deceased. Therefore, the answer PW1 gave is not conclusive that the deceased with such underlying condition could have been saved in the given situation.

[49] A medical expert's opinion is crucial for this court to make a finding in relation to the chances for the deceased's life to be saved. PW1's evidence is confined to the cause of death of the deceased; she was not called to give medical expert opinion whether the deceased's life could or could not have been saved in the given situation.

[50] In the event the plaintiffs' counsel's intention was to call PW1 as a medical expert to give her medical opinion on the chances the deceased's life could have been saved in the given situation, then this court finds PW1's opinion is insufficient to allow this court to make an assessment based on her opinion.

[51] In conclusion, taking into account the underlying condition (myocardial bridging and coronary atherosclerosis) of the deceased, and in the absence of a comprehensive medical expert opinion, it is not possible for this court to make a finding, based on balance of probabilities, that the deceased's life could have been saved if he had been brought to the hospital earlier. There is also no evidence whatsoever to suggest that the deceased had complained ill for several days, and that he was not given medical attention by the police in the detention centre.

[52] Based on the above evaluation, this court is unable to make a finding of fact that the deceased's life could have been saved if he was brought to the hospital earlier by the police.

[53] In conclusion, based on the evidence before this court, this court cannot make any finding that the defendants have committed a breach of their duty owed to the deceased and that such breach had caused the death of the deceased.

Other Considerations

[54] The plaintiffs' counsel submits that the second defendant (DW1), seventh defendant (D7/DW4), eighth defendant (D8/DW5), first defendant (DW6), fourth defendant (DW8) have respectively breached various provisions of the Lock-Up Rules 1953, Police Act 1967 and Police Regulations 1952. This court is of the considered view that evidence of those breaches, such as failure to perform checking at the lock-up cell every half an hour and failure to record on the station diary, do not establish a causal link between the breach and the actual cause of death of the deceased.

[55] This court is of the considered view that all the breaches will only become relevant if the plaintiffs' case is that before the deceased died on 17 April 2018, he had complained of not feeling well for many hours or days before his death but was not attended to. However, that is not the plaintiffs' case, and there is no evidence adduced before this court.

[56] The plaintiffs' counsel submits that there was no medical check-up performed on the deceased when he was arrested. This court is of the considered view that there is no evidence to suggest that if a medical check-up was carried out on the deceased upon his arrest, this would have definitely revealed the underlying condition of the deceased or that he had leptospiral infection.

Summary – No Breach Of Duty

[57] Based on the above findings, this court answers the issues to be tried as follows: (i) the defendants did owe a duty of care to the deceased; (ii) the defendants did not breach their duty(ies) of care in the given situation as the plaintiffs failed to prove (a) the deceased contracted leptospiral infection in

the detention centre, and (b) the deceased's life could have been saved if he had been sent to the hospital earlier; (iii) therefore, the causal link between any breach and the deceased's death is not established in that his death was caused by the defendants' actions or inactions or the breach of the statutory requirements.

[58] Flowing from the above, therefore, this court finds that the defendants are not liable to pay damages for the plaintiffs' dependency and estate claims under the cause of action of tort of negligence.

The Claim Of Misfeasance In Public Office

[59] In *Datuk Seri Khalid Abu Bakar & Ors* (*supra*), the Court of Appeal at para. [33] of its judgment states as follows:

> To sustain a claim of public misfeasance, what the plaintiff is required to prove is as set out in the case of *Three Rivers District Council v. Governor and Company of the Bank of England (No 3)* [2000] 2 WLR 1220 which are as follows:
>
> (i) The act complained of had been committed by a public officer purportedly pursuant to his exercise of his public power;
>
> (ii) The act committed must be done with malice which Lord Steyn in *Three Rivers* explained as follows:
>
> > First there is the case of targeted malice by a public officer, *ie*, conduct specially intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act probably injure the plaintiff. It involves bad faith in as much as the public officer does not have an honest belief that his act is unlawful;
>
> (iii) That there is proximity between the deceased and the defendants giving rise to the plaintiff a legal standing to sue; and
>
> (iv) That the acts of the defendants had caused material damage to the deceased.

[60] In the present case, there is not a shred of evidence in the plaintiffs' case to support a claim of misfeasance of public office in that the defendants had committed any illegal wrongdoing. No evidence of malice is presented before this court. There is no evidence to suggest the defendants have acted with an improper or ulterior motive or that they have no power to do the act complained of and that such act injured the plaintiffs. The plaintiffs did not show any evidence that the defendants have concealed, distorted or destroyed any evidence before this court. The mere fact that the deceased died in the custody of the defendants, that itself cannot immediately give rise to a claim of public misfeasance. Hence, the plaintiffs' claim under this head is totally unsustainable.

Conclusion

[61] This court, after having sieved through the evidence, is not satisfied that the plaintiffs have discharged their burden of proof on a balance of probabilities that the defendants had breached their duty in tort of negligence or that the breach could have led to the death of the deceased. The causal link between the actions and/or inactions of the respective defendants and the death of the deceased is not proved in the plaintiff's case. This court also finds the claim of misfeasance in public office against the defendants is not proved on the balance of probabilities. Hence, the entire plaintiffs' claim is dismissed. This court orders no costs to be paid by either party.